

9 Official Opinions of the Compliance Board 110 (2014)

- ◆ **ADMINISTRATIVE FUNCTION – *WITHIN EXCLUSION, DISCUSSION OF:***
 - ◇ RESIGNATION OF EMPLOYEE; PRESS RELEASE
- ◆ **NOTICE REQUIREMENT – *METHOD***
 - ◇ PRACTICES IN VIOLATION – USE OF WEBSITE ALONE WHEN MEETING CALLED ON SHORT NOTICE
- ◆ **CLOSED SESSION PROCEDURES – *WRITTEN STATEMENT***
 - ◇ **PRACTICES IN VIOLATION**
 - FAILURE TO PREPARE; FAILURE TO SPECIFY REASON FOR CLOSING
- ◆ **MINUTES OF OPEN SESSION – *PROCEDURE* – PRACTICES PERMITTED**
 - ◇ ROUTINE ADOPTION AT REGULAR MONTHLY MEETINGS
- ◆ **MINUTES OF OPEN SESSION – *SUMMARY OF CLOSED SESSION IN MINUTES OF OPEN SESSION* – PRACTICES IN VIOLATION**
 - ◇ FAILURE TO INCLUDE SUMMARY
- ◆ **EXCEPTIONS PERMITTING CLOSED SESSIONS – *LITIGATION, §10-508(a)(8)***
 - ◇ APPLICABLE TO DISCUSSIONS WITH COUNSEL ABOUT POTENTIAL LITIGATION ARISING FROM CONTRACT CHANGES
- ◆ **EXCEPTIONS PERMITTING CLOSED SESSIONS – *PROCUREMENT, §10-508(a)(14)***
 - ◇ APPLICABLE TO NON-COMPETITIVE CONTRACT DISCUSSIONS ONLY WHEN DISCLOSURE WOULD ADVERSELY AFFECT A SPECIFIC, RELATED COMPETITIVE PROCUREMENT

*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

May 19, 2014

Re: Maryland Health Benefit Exchange
Craig O'Donnell, Complainant

The General Assembly created the Maryland Health Benefit Exchange (“MHBE”) as an “instrumentality of the State” and made it expressly

subject to the Open Meetings Act (the “Act”).¹ Craig O’Donnell, Complainant, alleged on March 14, 2014 that MHBE’s Board of Trustees (“Board”) violated the Open Meetings Act (the “Act”) in numerous ways over the last two years. In response, MHBE disputed some allegations and explained its actions as to others. MHBE also described the steps that it has taken to remedy earlier lapses in its disclosures and the ongoing measures that it is taking to assure compliance.² Shortly after MHBE responded, Complainant submitted a new complaint. In it, he alleges violations dating from 2011 to the present.

It appears to us that Complainant’s first complaint has already had the salutary effect of causing this three-year-old board to evaluate its meetings practices and take concrete steps to conform them to the Act. Here, we will address the disputed allegations and remark only briefly on the allegations that the Board has pledged to address; when a public body responds to an allegation by specifying the steps it will take to conform to the Act, we have usually found it unnecessary to address each meeting at which that type of violation occurred.³ This opinion also resolves the allegations in the second complaint that fall in the same categories as the ones here. *See* Sections 2 and 3 below.

We will state our conclusions as we go along.

1. *Notice – the allegations that MHBE gave insufficient notice of its December 6 and February 23 meetings*

The Act requires public bodies to give “reasonable advance notice” of each meeting at which the public body will perform a function subject to the Act. State Government Article (“SG”) § 10-506(a). To determine whether a public body has complied with the Act, we first look to whether

¹ For these laws, see §§ 31-102 (b) and 31-103(a)(2) of the Insurance Article of the Maryland Annotated Code.

² MHBE also reports that certain members and staff have now taken online training on compliance with the Open Meetings Act. MHBE further advises us that it has now posted on its website descriptions of the meetings it closed to the public in 2012 and 2013.

³ *See, e.g., 8 OMCB Opinions* 86, 87 (2012) (finding it unnecessary to discuss each violation at over 15 meetings because the response showed that the school board’s counsel had since instructed it on how to comply with the Act); *3 OMCB Opinions* 140, 142 (2001) (finding that county commissioners’ decision to open its staff briefings to the public rendered “moot” the complaint that the commissioners’ earlier practice of holding those briefings in closed sessions and without public notice); *7 OMCB Opinions* 225, 234 (2011) (finding that the county’s provision of minutes to complainant rendered moot the allegation that none had been kept).

the meeting was subject to the Act; if the meeting was not subject to the Act, the allegations would not state a violation of it. *See, e.g.*, 6 *OMCB Opinions* 57, 59-60 (2008) (stating that even if the public body itself treated the event as a meeting subject to the Act, no violation of the Act could have occurred if the Act in fact did not apply to the event). If the meeting was subject to the Act, and thus to its notice provisions, we then look to the content, method, and timeliness of the notice. *See, e.g.*, 8 *OMCB Opinions* 76, 80 (2012).

a. December 6, 2013 meeting.

MHBE gave no notice of this meeting. MHBE explains that its executive director submitted an offer of resignation by e-mail at 6:20 on the evening of Friday, December 6. Ten minutes later, MHBE's chair, by e-mail, informed the Board of an emergency meeting to occur by teleconference at 7:00 p.m., and a quorum of the Board then participated in the meeting. MHBE further explains that the director's resignation posed an emergency, that the Board needed to decide the day-to-day leadership of its work immediately, that the Board decided to accept the resignation, and that it immediately issued a public statement about what had transpired at the meeting. Accepting Complainant's premise that the meeting was subject to the Act, MHBE acknowledges that the Board did not summarize the events of the meeting in the minutes of its next open session, as required by SG § 10-509(c)(2). The summary that MHBE has now posted states that the Board met to accept the executive director's resignation and approve the public statement.

The threshold question is whether the tasks that the Board performed at the meeting fell within the Act. As relevant here, the Act "does not apply to a public body when it is carrying out: an administrative function" SG § 10-503 (a). The Act defines "administrative function" by what it is—the "administration" of laws, rules, regulations, or bylaws—and by what it is not—the other functions defined by the Act. SG § 10-502(b). Broadly speaking, "[t]he action must be administrative in character, rather than policy-making, to apply." 3 *OMCB Opinions* 105, 107 (2001). If the matter discussed falls within the definition of an administrative function, "it is excluded from the Act, no matter how important the matter might be considered or how keen the public interest in it." 8 *OMCB Opinions* 107, 109 (2012), 6 *OMCB Opinions* 23, 25-26 (2008).

We have applied the definition to tasks similar to the two tasks that MHBE performed here. When a public body met to dismiss an employee, 1 *OMCB Opinions* 166 (1996), evaluate an employee's performance, 3 *OMCB Opinions* 218, 221 (2002), fill a vacancy, 1 *OMCB Opinions* 252 (1997), or make an appointment, 6 *OMCB Opinions* at 61, we have found those discussions to be administrative in nature. And, we have found that

the wording of press releases and the procedures for issuing them are topics that fall within the exclusion. 1 *OMCB Opinions* 133 (1995) (discussion of press release by board of aldermen was not subject to the Act); 8 *OMCB Opinions* 89, 91 (2012) (county commissioners' discussion of current press release procedures "fall easily into the administrative function exclusion as we have applied it"). Here, too, we find that MHBE was performing administrative functions when it met to address its employee's resignation letter and the issuance of a public statement.

This matter exemplifies the regrettable difficulty, for public bodies, the public, and representatives of the press alike, of applying the administrative function exclusion. In 2001, we noted that the exclusion, then known as the "executive function" exclusion, "has occupied more of the Compliance Board's time than any other provision of the Act," and we described it as the "most bedeviling aspect" of the Act. 3 *OMCB Opinions* at 106-07. In 2005, the General Assembly directed us to study the exclusion, and we surveyed the practices of a variety of public bodies. We reported widespread "difficulty in understanding the meaning and scope" of the exclusion. We described "confusion between meetings that fall outside the scope of [the Act] because they involve an executive function," and "meetings that may be closed under the Act in accordance with the Act's procedural requirements [in] § 10-508." Use of the Executive Function Exclusion under the Maryland Open Meetings Act - Study and Recommendations by the Open Meetings Compliance Board (December, 2005), p. 6. As one cause of the confusion, we noted that a public body's exercise of its administrative function might overlap with one of the fourteen subjects for which a public body may close a public meeting under § 10-508(d). For example, we said, a board of town commissioners "that employs a town manager pursuant to [the town] charter to assist in the day-to-day operations of the government" could either "consider the manager's employment evaluation as an executive function outside the Act" or conduct the evaluation "in a meeting closed under the Act [because] it involves a personnel matter." Study, p. 6. See also 8 *OMCB Opinions* 120 (2012) (finding that the public body properly closed its open meeting to discuss appointees in accordance with § 10-508(a)(1), but that it could probably also have invoked the administrative exclusion). The confusion persists.

Here, the Board confounded matters by creating the type of written closing statement that would have been appropriate for use in closing an initial open meeting and then using it in connection with an unnoticed conference-call meeting that was clearly never open to the public.⁴

⁴ It is unclear to us when the Board prepared the written "closing statement" that must be prepared before a public body votes to exclude the public from a meeting subject to the Act. See SG § 10-508(d). Although that fact does not matter to the outcome on this allegation, we wish to dispel any possible confusion on the

Nonetheless, the Board should not be faulted for making disclosures as though the Act applied. In short, MHBE's meeting on the evening of December 6, 2013 was not subject to the Act, and MHBE did not violate it.

b. February 23, 2014 meeting.

The complaint alleges that the Board did not provide "reasonable advance notice" of the telephone meeting that it held on Sunday, February 23, 2014. MHBE states that the Board met to discuss the terms of both the termination of its prime contractor for the provision of a web-based system for enrolling people in health plans and the assumption of some of that work by another contractor. MHBE states that "[t]erms for the Board's consideration were identified by the parties very late on the night of Friday, February 21," that any delay "beyond the weekend" would have "brought much of the work on the project to a standstill," and that notice was posted on MHBE's website early in the evening of February 22, "as soon as the meeting was scheduled."

First, we conclude that the meeting was subject to the Act. Meetings at which public bodies perform a "quasi-legislative" function are subject to the Act, and the Act defines that function to include "approving, disapproving, or amending a contract." SG § 10-502(j). We understand from the response that the Board was terminating the prime contractor's contract and entering into new terms as to the termination or perhaps amending the existing contract to provide for the termination, or perhaps both. As to the other contractor, it appears that the Board was discussing amendments to the contract. We therefore turn to the whether the content, timeliness, and method of the notice comported with the Act.

As to content, the notice must specify the date, time, and place of the meeting. Further, "if appropriate," the notice must inform the public of the public body's intent to vote to close all or part of the meeting. SG § 10-506(b). The purpose of that provision is to alert the public that the only business that the public body will perform publicly is a vote on a motion to close the rest of the meeting. 3 *OMCB Opinions* 293, 299 (2003). Here, the content of the notice was mostly sufficient; the notice provided the time and date and listed a call-in number for anyone who wished to "attend" by listening. However, the Board was also required to notify the public that it

subject of closed-meeting disclosures required by the Act, when it applies. We refer MHBE to the closed-meeting rules we stated in 8 *OMCB Opinions* 182, 183-84 (2013), posted at <http://www.oag.state.md.us/Opinions/Open2012/8omcb182.pdf>. As explained there, the Act requires two distinct sets of written disclosures: the written closing statement that may *only* be prepared before the meeting is closed and must be available to the public at that time, and the closed-meeting summary, sometimes called a "closed-meeting statement," that reports on the actual discussion and must be included in the minutes of the next open session. We discuss this further in the "Minutes" section, below.

intended to close every part of the meeting except the vote on a motion to convene behind closed doors. We find that the notice was inadequate in this regard.

As to timeliness, the Act does not quantify the concept of “reasonably in advance.” The Act thus does not prohibit a public body from addressing urgent matters on an urgent basis. We have advised that a public body that will meet on short notice to address an emergency must give “the best public notice under the circumstances.” We have looked to whether the public body gave notice as soon as practicable after it scheduled the meeting and whether the public body has ameliorated the lateness of the notice by making extra efforts to inform the media and others who follow its activities. See 8 *OMCB Opinions* at 80-83 (explaining the Act’s timeliness requirement); see also, e.g., 7 *OMCB Opinions* 237, 239 (2011) (noting that sudden schedule changes require the use of more methods than usual). With regard to last-minute notices, we have also advised that “a public body that notifies the public of regular meeting dates on a website should not assume that people will continuously check [it].” 7 *OMCB Opinions* at 239. So, for last-minute meetings, the timeliness and method inquiries converge.

The Act lists five methods of publishing meeting notices. The public body may post notice in a convenient public location or on its website if it has informed the public of those methods. If it is a State agency, it may give notice in the Maryland Register. It may deliver notice to “representatives of the news media who regularly report on” its meetings or “the activities of the government of which the public body is a part.” And, it may give notice “by any other reasonable method.” SG § 10-506(c). Although the Act seemingly gives a public body its choice of these methods, we have read the provision in light of the overall requirement that notice be “reasonable,” and sometimes a method on the list is not reasonable. See e.g., 8 *OMCB Opinions* 111, 113 (2012) (for a multi-county entity, posting notices on the office door is not an effective method of giving notice).

For a meeting held under ordinary circumstances, we would not question a public body’s decision to post notice on the website it usually uses for that purpose; after all, the Act provides that a public body may post notice that way. See SG § 10-506(c)(3). As noted above, however, last-minute meetings require the public body to make extra efforts to get the word out to the press, and ideally to the members of the public, who follow its activities. We find that it would have been feasible for MHBE to at least alert representatives of the media to monitor its website for a meeting notice. We also find that MHBE did not do so. Only by happenstance would a reporter or other person interested in the Board’s meetings check the MHBE website on a Saturday evening to see whether the Board would be meeting that Sunday.

Under these circumstances, we find that, although the Board did not keep secret its intention to meet, the notice it provided was not the requisite “reasonable advance notice.” With regard to Complainant’s assertion that a public body that meets to address an emergency must specify the emergency in the meeting notice, the Act does not so require. A public body might wish to include that information to allay suspicion, but that decision lies with the public body.

2. *Closing Statements - the allegations that the Board held closed sessions subject to the Act without first making the required written disclosures*

The Act expressly excepts fourteen topics from the requirement that a public body meet openly when it is performing a function subject to the Act. *See* SG 10-508(a). Before a public body may convene a closed session to discuss one of those topics, however, the public body’s chair must perform two tasks. First, the chair must make (or adopt) a written “closing statement” that discloses the topics to be discussed in the closed session, the reasons for discussing them behind closed doors, and a citation of the legal authority for excluding the public. Second, the chair must conduct a recorded vote on a motion to close the meeting on that stated basis. These rules are summarized in 8 *OMCB Opinions* 182, 183-84 (2013).

Complainant questions whether the Board had created closing statements for the meetings in held in 2012 and 2013. The Board’s response acknowledged that it had not regularly posted closing statements but had often instead disclosed that information later, in minutes. On our request for clarification, the Board’s counsel confirmed our understanding that the Board did not invariably prepare a written closing statement before voting to convene in closed session. Each time the Board closed a meeting subject to the Act before creating a closing statement, it violated § 10-508(d).

Complainant also questions the fact that, although a hand-written closing statement was prepared at the time of the February 23, 2014 meeting, MHBE posted a typed version.⁵ A public body should retain a copy of the original closing statement, as it appears that MHBE has done, and either the original or a copy must be available for inspection immediately. If, as a courtesy to the public, MHBE wishes to generate a typed version of a hand-written closing statement, add a summary of what

⁵ In other matters, Complainant has inferred from the public body’s use of a pre-prepared, typed closing statement that staff prepared it and the presiding officer never saw it. *See, e.g.,* 9 *OMCB Opinions* 1, 6 (2013), 7 *OMCB Opinions* 226 (2011). We have suggested that presiding officers might protect themselves from such suspicions by signing the statement when they conduct the vote to close. 7 *OMCB Opinions* at 226, 227.

occurred at the meeting, disclose who was present, and post all that information, it may certainly do so.

As for the hand-written version that MHBE produced to Complainant, a public body's chair and its staff also should not be faulted for bringing the closing statement into the closed meeting and adding notes about what transpired there.⁶ We have encouraged presiding officers and staff to bring the closing statement into the closed session and do not want the publication of allegations such as these to deter them from doing so. A presiding officer who brings the statement into the closed session is thereby equipped to keep the discussion within the topics disclosed in advance. And, the model form that we encourage public bodies to use is designed to be written on; it prompts the presiding officer to address with the other members the level of detail of the later disclosures. A member of the public is not entitled to inspect the copy that contains the post-session summary before the Board has adopted the summary in the later minutes of an open meeting.

With regard to the content of the February 23, 2014 closing statement, we find that the Board adequately disclosed the topics it expected to discuss but did not state its reason for excluding the public from its discussion of the three disclosed topics. The Board's March 7 closing statement also omits the reason for closing. Under the Act, the public is entitled to be told why the discussion must be conducted behind closed doors. We find that the Board also violated the Act in this regard.

Our guidance in this section applies to the category of allegations, both in this complaint and the second, that question the adequacy and existence of the Board's closing statements. We will not address the issue again for meetings that pre-date the issuance of this opinion.

3. *Minutes of Open and Closed Sessions: Timeliness, Access, and Contents*

a. Timeliness and access

The complaint alleges that the Board did not adopt minutes in a timely fashion. As relevant here, the Act requires, "[a]s soon as practicable after a public body meets, it shall have written minutes of its session

⁶ The Board used the model closing statement that our staff have posted online. That form has two sections: one that prompts the chair to make every disclosure required by SG § 10-508(d) and another, clearly labeled "For use in minutes of next regular meeting," that prompts the presiding officer or staff to make notes about what transpired in the meeting. <http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf>. The form was designed to make it easy to fill out by hand.

prepared.” SG § 10-509(b). This requirement “permits a public body to take a reasonable amount of time to review draft minutes for accuracy and to approve the minutes” The Act “does not impose a rigid time limit.” 2 *OMCB Opinions* 87, 88 (1999). We have found “routine delays” of several months to be unreasonable, 2 *OMCB Opinions* at 89, and a delay of “a mere ten days” not unreasonable. 3 *OMCB Opinions* 85, 90 (2001). An allegation that a public body has delayed posting minutes on its website or has not transmitted copies to a person who requests them by letter does not state a violation of the Act; the Act simply requires that minutes “be open to inspection during ordinary business hours.” SG § 10-509(d). Of course, posting minutes and closing statements online, as MHBE is now doing, is for many public bodies an efficient method of making these documents available for inspection. We have long recommended that method for public bodies with the staff and capability, but the Act does not require it. Closed session-minutes “shall be sealed and may not be open to public inspection.” SG § 10-509(c)(3)(ii).

Complainant alleges that, as of March 13, 2014, the Board had “failed to timely approve,” and “failed to timely publish,” minutes for seven meetings that occurred between January 4, 2014 and March 7, 2014. He complains also that he asked MHBE staff whether the Board had approved minutes for the first six meetings and was told that staff did not know. MHBE responds that it usually adopts the minutes of each regularly-scheduled meeting at the next regularly-scheduled meeting. It adopted the 2014 closed-session minutes more slowly. The 2014 minutes about which Complainant complains have now been posted. Although it apparently took the Board several months to adopt minutes of the January 4 session, which the Board closed to discuss procurement matters, we do not perceive any routine delay. Our finding that the Board did not violate the timeliness requirement for minutes applies also to its earlier minutes. A review of the minutes online shows that the Board often approved minutes on a monthly basis, sometimes approved them more quickly, and sometimes approved them more slowly.

As to access, a person who wishes to travel to a public body’s office to look at minutes should be able to ascertain in advance whether the office in fact has those minutes. In our view, nothing is gained by requiring someone to come to an office just to find out whether minutes have been approved yet. As we have stated in other contexts, members of the public and the public body’s staff should work the logistics out themselves. *See, e.g., 8 OMCB Opinions* 1 (2012) (addressing a person’s on-the-spot request of the public body’s lone staff member for years’ worth of minutes). Yet again, we inform Complainant that a public body does not violate the Act by failing to post its minutes on its website or refusing to scan and e-mail documents to him.

This guidance also resolves the issue for all meetings pre-dating the issuance of this opinion.

b. Contents

The minutes “shall reflect: each item that the public body considered; the action that the public body took on each item; and each vote that was recorded.” SG § 10-509(c) (numbering omitted). If a public body has closed a meeting subject to the Act, it must include four categories of information in the minutes for its next open session: (1) the time, place, and purpose of the closed session; (2) each member’s vote on the motion to close the session; (3) the statutory authority for closing the session; and (4) the topics discussed, persons present, and actions taken. SG § 10-509(c)(2).

The complaint alleges, and we find, that the Board violated the Act by not making the required disclosures about each closed session in the subsequent open session minutes. For example, the open session minutes that the Board adopted in July 2013 do not contain a summary of the June 14, 2013 closed session, and the June 11, 2013 minutes do not contain a summary of the May 14, 2013 closed session. The summary of the March 7, 2014 closed session shows that the members present at the open session also attended the closed session, but it is unclear whether counsel who were identified as attending the open session also attended.⁷ Under most circumstances, the public is entitled to know the identities of the people with whom a public body is meeting behind closed doors.⁸

The Board acknowledges its violations of this category of rules. It states that it now adds to each closing statement a description of the events actually discussed and then adopts that document at the next open session. So long as the closing statement, with those additions, conveys all four categories of information required by SG § 10-509(c)(2), and so long as the Board adopts that document as part of the minutes of the open session, that method complies with the Act. The minutes themselves should then reflect that the Board has adopted the closing statement, with its post-session summary, as part of the minutes.

This guidance resolves the issue for all meetings pre-dating the issuance of this opinion.

⁷ The Board’s response and closed-session minutes confirm that counsel indeed attended.

⁸ The closing form used at that meeting omitted the spaces for “persons attending.” The model form posted at <http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf> prompts the person who is completing the form to include that information.

4. *Permissibility of the closed sessions on February 23 and March 7, 2014*

Ordinarily, a public body's "process or act" of "approving, disapproving, or amending a contract" must occur in a public meeting, as that is a quasi-legislative function subject to the Act. § § 10-502(j), 10-503. However, the Act permits a public body to close such a meeting in order to discuss any of the fourteen topics, known as "exceptions," listed in SG § 10-508(a). When a meeting is subject to the Act, the public body "may not discuss or act on any matter" that is not permitted by an exception. SG § 10-508(b).

Among the exceptions are ones that permit a public body to close a meeting to "consult with counsel to obtain legal advice" and "consult with staff, consultants, or other individuals about pending or potential litigation." SG § 10-508(a)(7), (8). Also, "before a contract is awarded or bids are opened," the public body may close a meeting to "discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal." However, that exception applies only "if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." SG § 10-508(a)(14). As we explained in 1 *OMCB Opinions* 233, 234 (1997), the §10-508(a)(14) exception is premised on the existence of a competitive bidding or proposal process and does not apply to "'negotiation issues' as such." *See also* 1 *OMCB Opinions* 73, 84-85 (1994) (stating that SG §10-508(a)(14) "does not extend to all matters of 'negotiation and compromise'; it is limited to the competitive bidding or proposal process"). In short, SG §10-508(a)(14) applies to discussions which, if held in public, would have an adverse impact on the public body's ability to engage in a competitive procurement, not to discussions concerning contracts in other contexts.

The exceptions must be "strictly construed in favor of open meetings." SG § 10-508(c). On occasion, an exception extends to another topic, but only when that topic and the excepted one are "so intertwined" that they cannot be discussed separately. 9 *OMCB Opinions* 15, 27 (2013). In the procurement context, we have found that discussions of contract extensions, sole-source contracts, and memoranda of understanding could be so intertwined with an impending procurement matter as to fall within the exception. 8 *OMCB Opinions* 8, 14-15 (2012). We stressed there that "the public body must be able to identify a tangible connection to a particular procurement in which the public body expects to engage or participate with another public body."

a. February 23, 2014 meeting - the "potential litigation" and procurement exceptions

The Board's closing statement disclosed that it would discuss three topics: "Noridian work out of transition plan," "QSSI/Optum Contract Modification," and "Statement of Board on Noridian's role." The handwritten closing statement clearly circles the citation for the procurement exception and has a large mark centering mostly on the exception for consultations with staff or others about "pending or potential litigation," just below the exception for consulting with counsel for legal advice.⁹ The summary of the meeting discloses that "Board approved moving forward to terminate contract with Noridian; Board approved contract modification for QSSI/Optum; Board approved public statement." The response explains that the discussion involved "how to preserve legal claims against a contractor that had failed to perform" and the "expansion" of MHBE's relationship with QSSI/Optum to perform "many of the functions that Noridian had been performing." The response further states that "advice of counsel was the focus of the discussion."¹⁰ As to this meeting, the response does not explain how the discussions involved a particular procurement in which MHBE expected to engage.

We find that the discussion fell within the SG § 10-508(a)(8) exception that permits a public body to discuss potential litigation with its staff and others. Nonetheless, the Board violated the Act as to this meeting because the permission that the Act grants to a public body to close a meeting is conditioned on the public body's adequate disclosure, before it meets, of the reason for the closed session. Sometimes the topics themselves make that obvious. These did not. Had the public been told that the Board was meeting with its counsel and staff to discuss the legal implications of making changes to the contractors' work in its project, the public would most likely have understood the need for confidentiality.

We are also given pause by the fact that the Board took action, in this closed session, after receiving its counsel's advice on the contracts in question. We recognize that the decision of the Court of Appeals in *J.P. Delphely L.P. v. Mayor of Frederick*, 396 Md. 180, 201 (2006) has created some confusion on the extent to which a public body may act in a closed

⁹ We will rely on the handwritten statement as the best indication of the exceptions the Board relied on at the time. The typed version of the closing statement identifies the legal advice exception instead of the "pending or potential litigation" exception. It goes without saying that the exceptions on the typed version should match those on the statement made at the time. However, the "pending litigation" and "advice of counsel" exceptions are closely related, and either designation could have been used without misleading the public as to the nature of this particular meeting.

¹⁰ MHBE provided our counsel with its closed-session minutes for the February 23 and March 7, 2014 meetings. We keep those minutes confidential under SG § 10-502.5(c)(iii). They confirm MHBE's public disclosures about the meetings and show that counsel attended them.

meeting on the matter under consideration. There, the Court opined that a public body could act on the acquisition of real property in a meeting that the public body had permissibly closed under the SG § 10-508(a)(3) exception for the consideration of that topic. The Court cited SG § 10-508(b), which provides, “A public body that meets in closed session under this section may not discuss or act on any matter not permitted under subsection (a) of this section.” The Court construed that provision to convey an affirmative grant of permission. It stated: “there is no ambiguity in the plain language of Section 10-508 (b) of the Open Meetings Act; the provision clearly authorizes a public body to ‘discuss or act on any matter,’ listed under subsection (a), which includes ‘the acquisition of real property’” Read broadly, *Delphey* would permit public bodies to act in closed session on any of the 14 topics listed in the exceptions.

We read *Delphey* narrowly, in favor of open meetings, in accordance with the instruction in SG 10-508(c) that the exceptions be construed that way. The real property acquisition exception applies to the public body’s own “consideration” of a specific category of matters. By contrast, the “potential litigation” and “legal advice” exceptions apply open-endedly to the public body’s “consultation” with staff and counsel. If the Act were construed to permit closed-session actions on every topic on which the public body seeks counsel’s advice, and every matter in which counsel, staff or consultants advise on potential litigation, those exceptions would swallow the rule of openness.

We thus do not read *Delphey* to change our view that a public body may receive legal advice in a closed session but then must act on that advice in an open meeting unless another exception or law provides that the decision itself may be kept confidential. *See, e.g., 7 OMCB Opinions* 148, 164 (2011). So, unless the actions that the Board took in the closed session would have impaired its ability to compete in future competitive procurements, it is our view that it should have taken those actions in open session. As suggested by our discussion, the Act continues to pose quandaries on the fundamental question of what may be done in closed sessions.

The other topic of discussion at the meeting—the Board’s discussion about the issuance of a public statement—was an administrative function, not subject to the Act.

b. March 7, 2014 meeting - the “legal advice” and procurement exceptions

The Board held its March 7, 2014 closed meeting by conference call, and it lasted 30 minutes. The Board’s closing statement identifies the legal advice and procurement exceptions as the legal authority for the

closed session, lists “Contract Modification for Hosting” and “Legal advice related to Noridian departure” as the topics to be discussed, and does not state the Board’s reason for excluding the public. The post-meeting summary states: “Board discussed terms of Noridian departure, received legal advice re: same. Board supported QSSI/Optum contract modification for hosting as an emergency procurement.”

The response explains that the Board closed the meeting for two reasons. First, the Board wished to preserve “MHBE’s ability to undertake, in the future, a competitive procurement for hosting services” and that the discussion, if held publicly, “might have revealed information that had the potential to adversely impact a future procurement for hosting.” Second, “the Board’s decisions necessarily included consideration of the impact the decisions may have on future litigation, and obtaining legal advice was an integral part of making these decisions.”

We have no reason to doubt the applicability of the legal advice exception and find that the Board did not violate the Act by closing the meeting on that basis. We would hesitate to apply the procurement exception to the award of a contract to assume work for which the public body had already published the specifications in an earlier procurement process. Here, however, MHBE’s response states that the discussion implicated information that, if disclosed, could adversely impact a future procurement for hosting services. It therefore appears that the Board was discussing information that it had not already published in the earlier procurement.

As we advised in 8 *OMCB Opinions* 63, 70 (2012), a public body that invokes the procurement exception should indicate on its closing statement “why confidentiality of the discussion is needed to assure the [public body’s] ability to participate in the competitive process, particularly when a member of public might think that the procurement has already been completed.” The public body’s post-meeting disclosure should convey to the public that the discussion that was actually held needed to be confidential for the reason disclosed beforehand. The Board’s disclosures did not assure the public of the applicability of the procurement exception.

Conclusion

We have concluded that the Board violated the Act in the ways described in sections 1(b), 2, 3(b), and (4) of this opinion. In the interest of providing expeditious guidance, we have also resolved many of the allegations in the second complaint. For the most part, the violations pertained to the adequacy of the Board’s disclosures about its meetings; except as noted, we have concluded that the public was not entitled to hear the Board’s discussions at those meetings. One violation arose from the

Board's use of its website as the sole way of publishing a meeting that it needed to convene on short notice.

We have also identified two aspects of the Act that understandably confuse public bodies, public servants, and the public: first, the applicability of the administrative function exclusion to specific personnel actions, and, second, the applicability, or not, of the exceptions that allow a public body to obtain legal advice in a closed session to the actions that the public body then takes on that advice. The law is particularly unclear on the second issue. Our tenure on this Board draws near its close; we have discussed these issues for consideration by the next.¹¹

Open Meetings Compliance Board

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Monica J. Johnson, Esquire

¹¹ *Staff note:* Chair Elizabeth L. Nilson has served on the Compliance Board for seven years. Her resignation takes effect on June 1, 2014. Member Courtney J. McKeldin has served since the inception of the Compliance Board in 1992. Each considered every opinion that the Board issued during those years.